

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 67-89  
(AMENDED):

MONTANA FEDERATION OF TEACHERS  
AFT, AFL-CIO,

Complainant,

vs.

FLATHEAD VALLEY COMMUNITY COLLEGE,

Respondent.

FINAL ORDER

\* \* \* \* \*

The Findings of Fact; Conclusions of Law; and Recommended Order were issued by Stan Gerke on February 15, 1991.

Exceptions to the Hearing Examiner's Findings of Fact; Conclusions of Law; and Recommended Order were filed by Dan Evans on behalf of the Complainant on March 8, 1991.

The Board reviewed the record and information submitted and considering the oral arguments, the Board orders as follows:

1. IT IS ORDERED that the Exceptions to the Findings of Fact; Conclusions of Law; and Recommended Order are hereby denied.

2. IT IS ORDERED that this Board therefore adopt the Findings of Fact; Conclusions of Law; and Recommended Order of the Hearing Examiner Stan Gerke as the Final Order of this Board.

BOARD OF PERSONNEL APPEALS

By   
Robert A. Poore  
Chairman

1 STATE OF MONTANA  
2 BEFORE THE BOARD OF PERSONNEL APPEALS

3 IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 67-89 (AMENDED)

4 MONTANA FEDERATION OF  
5 TEACHERS, APT, AFL-CIO,

6 Complainant,

7 vs.

8 FLATHEAD VALLEY COMMUNITY  
9 COLLEGE,

10 Defendant.

11 FINDINGS OF FACT;  
12 CONCLUSIONS OF LAW;  
13 AND  
14 RECOMMENDED ORDER

15 \* \* \* \* \*

16 On December 18, 1989 the Complainant, Montana Federation of  
17 Teachers, APT, AFL-CIO (hereafter the "Federation") filed an Unfair  
18 Labor Practice Charge with this Board alleging that the Defendant,  
19 Flathead Valley Community College (hereafter the "College")  
20 violated Section 39-31-401(1) and (3) MCA. More specifically, the  
21 Federation alleged the College had altered individual teachers'  
22 contracts and changed class scheduling in certain academic quarters  
23 for two individuals because of their union activity. In Answer  
24 filed with this Board on January 18, 1990, the College denied any  
25 violations of the cited statutes.

26 This Board conducted an investigation in this matter and  
27 issued an Investigation Report and Determination on March 27, 1990.  
28 The Report found probable merit regarding the Federation's  
29 allegations and referred the matter to an evidentiary hearing.

30 An initial pre-hearing conference in this matter was conducted  
31 on June 11, 1990, before Stan Gerke, Hearing Examiner. During the  
32 conference certain matters were discussed which prompted the  
Federation to request additional time for discovery. The pre-  
hearing conference was continued.

On August 22, 1990, the Federation filed an Amended Unfair  
Labor Practice Charge. The amended charge narrowed the issues as  
first alleged in the initial charges.

1 Subsequent to reconvening the pre-hearing conference, a formal  
2 hearing was conducted on October 17, 1990, in Kalispell, Montana.  
3 The formal hearing was conducted under authority of Section 39-31-  
4 406 MCA and in accordance with the Administration Procedure Act,  
5 Title 2, Chapter 4, MCA.

#### 6 ISSUE

7 The issue in this matter is to determine whether the College  
8 has violated Section 39-31-401(1) MCA. More specifically, were the  
9 changes in course offerings for the Summer 1989, Fall 1989, and  
10 Winter 1990 academic quarters motivated by the union activity of  
11 Frank Talley and Robert C. Walthaire?

#### 12 FINDINGS OF FACT

13 1. Frank Talley and Robert C. Walthaire are part-time  
14 instructors at Flathead Valley Community College.

15 2. The full-time instructors are, and have been, represented  
16 for collective bargaining purposes by the Montana Education  
17 Association, NEA.

18 3. On February 15, 1989 Mr. Talley was informed that classes  
19 he was to teach (Religious Studies and Philosophy) were not to be  
20 included on the Spring Quarter 1989 schedule for budgetary reasons.

21 4. Mr. Talley initiated formal action on February 28, 1989  
22 through independent legal counsel to have the particular classes  
23 reinstated on the Spring Quarter 1989 schedule by asserting a legal  
24 right to continue teaching at Flathead Valley Community College.  
25 As a result of Mr. Talley's formal assertions of his claim of right  
26 to be hired and in consideration of certain legal ramifications  
27 that may transpire, legal counsel for the College advised that Mr.  
28 Talley not be hired for Spring Quarter 1989 and that he be hired  
29 only infrequently or sparingly thereafter. The College followed  
30 legal counsel's advice.

31 5. Religious Studies and Philosophy courses (formally taught  
32 by Mr. Talley) were deleted from the 1989-90 catalog. None

1 specifically the descriptions of the Religious Studies and  
2 Philosophy courses were deleted from the catalog and were replaced  
3 with a statement that indicated new philosophy courses will be  
4 offered during the 1989-90 college year. The College  
5 Administration had begun consideration of replacing the Religious  
6 Studies and Philosophy courses with a series to be denominated as  
7 "Value Studies". However, this proposal was not sufficiently  
8 developed by the deadline for publication of the 1989-90 catalog.  
9 Therefore, a notation was placed in the catalog reflecting the fact  
10 that alternative courses would be offered. The 1989-90 catalog did  
11 contain a course entitled "Church and State in the United States"  
12 that Mr. Talley had taught.

13 6. The proposal for Value Studies courses was still not  
14 developed before the deadline for publication of the 1990-91 school  
15 catalog. Therefore, the Religious Studies and Philosophy courses  
16 formally taught by Mr. Talley were once again included. Of special  
17 mention is the fact that the College had planned to change from a  
18 quarter academic system to a semester system in the 1991-92 school  
19 year. This change would require an entire rewrite of the school  
20 catalog. In an attempt to save staff time and money, the 1990-91  
21 catalog was a reprint of the 1989-90 catalog (except the cover)  
22 with any changes of course offerings contained on inserted blue  
23 colored pages.

24 7. On or about October, 1989 Mr. Talley filed a lawsuit in  
25 District Court against the College asserting his legal right to be  
26 rehired. During pendency of the lawsuit, the College did not  
27 employ Mr. Talley in any capacity and planned not to rehire Mr.  
28 Talley for the 1990 Winter Quarter unless the Court directed to do  
29 otherwise. Ultimately, the District Court ruled that Mr. Talley  
30 did not have a vested right to continue teaching at the College  
31 and, therefore, the Court did not order the College to re-employ  
32 Mr. Talley.

1       8. Pursuant to usual procedures, Mr. Robert C. Walthire  
2 submitted a written proposal in early Spring 1989 to teach  
3 Economics 211 during Summer Quarter 1989 beginning June 19, 1989.  
4 On May 1, 1989, Mr. Walthire's proposed course was deleted from the  
5 Summer Quarter 1989 schedule by appropriate officials of the  
6 College. Reasons for Mr. Walthire not teaching Economics 211  
7 during Summer Quarter 1989 included budgetary considerations; the  
8 decision to utilize full-time teachers rather than part-time  
9 teachers whenever possible; and, the request of Mr. Dick Uhde, a  
10 full-time faculty who usually teaches Economics, to teach as much  
11 as possible during the 1989-90 academic year.

12       9. Mr. Walthire was informed of the decision and  
13 justification to delete his proposed Economics course on May 2,  
14 1989.

15       10. On or about August 2, 1989, Mr. Walthire and the College  
16 entered into an individual teaching assignment contract  
17 (originating from a course teaching proposal submitted by Mr.  
18 Walthire) providing that Mr. Walthire would teach the course  
19 entitled "History of Railroads of the Northwest" during Fall  
20 Quarter 1989. Because an insufficient number of students  
21 registered for this particular class, it was cancelled pursuant to  
22 established policy requirements.

23       11. Sometime in early 1989, possibly as early as January, Mr.  
24 Talley gave consideration to the notion of organizing a part-time  
25 faculty union. Sometime after February 15, 1989 (the date Mr.  
26 Talley was informed he would not be teaching Spring Quarter 1989)  
27 Mr. Talley contacted the Montana Education Association concerning  
28 the procedures of organizing. Sometime after his contact with the  
29 MEA, Mr. Talley contacted the Montana Federation of Teachers, AFT,  
30 AFL-CIO (the Federation).

31       12. Sometime during Spring 1989 Mr. Talley, Mr. Walthire, and  
32 Mr. Bob Zarobsky, a tenured full-time teacher, began an

1 organizational effort with the assistance of the Federation to  
2 develop a part-time teachers union. Mr. Zarobsky has continued his  
3 employment with the College with no interruptions.

4 13. On April 27, 1989 a meeting was conducted with those  
5 interested in organizing a part-time teachers union attending.  
6 This meeting was the initial involvement for Mr. Waitaire.

7 14. A Petition for New Unit Determination and Election was  
8 filed with the Board of Personnel Appeals on May 24, 1989  
9 concerning the part-time teachers. The Petition was not filed on  
10 the College until June 1, 1989.

11 15. The June 1, 1989 edition of the campus newspaper, the  
12 "Mercury" contained an article outlining Mr. Talley's union  
13 organizing activities. The article was written by Adam Talley, a  
14 student at the College and son of Mr. Talley.

15 16. On June 6, 1989, a President's Cabinet meeting was  
16 conducted. The Cabinet is comprised of administration personnel of  
17 the College. Since the College had been recently served with the  
18 Petition for New Unit Determination and Election concerning the  
19 part-time teachers, the matter was included on the agenda for the  
20 President's Cabinet meeting. During the meeting, the article  
21 contained in the campus newspaper concerning Mr. Talley's union  
22 organizational activities was mentioned and College President  
23 Howard L. Fryett requested a copy of the article be placed in Mr.  
24 Talley's personnel file.

#### 25 DISCUSSION

26 Basically, the Federation has alleged the College has  
27 retaliated against Mr. Talley and Mr. Waitaire for their union  
28 organizing activity by cancelling their respective classes they  
29 generally teach and/or refusing to re-employ them.

30 The College has raised the affirmative defense of bar by  
31 statute of limitations. Section 39-31-404 MCA requires an unfair  
32 labor practice charge be filed within six months of its occurrence.

1 The charge in this matter was initially filed on December 18, 1989.  
2 The College argues the unfair labor charge, as filed, alleges Mr.  
3 Talley was informed of his non-employment on February 15, 1989 and  
4 Mr. Walthire was informed of cancelled classes on May 2, 1989 and  
5 both dates occurred outside the six months period prior to the  
6 filing date of December 18, 1989. The question here is whether the  
7 statutory time began to run when the Federation first learned of  
8 the College's intent of not re-hiring Talley and cancelling  
9 Walthire's classes. The Montana Supreme Court has approved the  
10 practice of the Board of Personnel Appeals in using federal court  
11 and National Labor Relations Board (NLRB) precedence as guidelines  
12 interpreting the Montana Collective Bargaining for Public Employees  
13 Act as the State Act is so similar to the Federal Labor Management  
14 Relations Act, State ex rel Board of Personnel Appeals v. District  
15 Court, 183 Mont. 223 (1979), 598 P.2d 1117, 101 LRM 2297;  
16 Teamsters Local No. 45 v. State ex rel Board of Personnel Appeals,  
17 195 Mont. 272 (1981) 635 P.2d 1310, 110 LRM 2012; City of Great  
18 Falls v. Young (III), 606 P.2d 185 (1984) 199 LRM 2682. Relating  
19 to this instant matter the Ninth Circuit of Appeals addressed an  
20 identical question and held: "[N]otice of the intention to commit  
21 an unfair labor practice does not trigger section 10(b) [of the  
22 NLRA]." See National Labor Relations Board v. International  
23 Brotherhood of Electrical Workers, Local Union 112, AFL-CIO, 827  
24 P.2d 530 (9th Cir. 1987), 126 LRM 2293. There the court agreed  
25 with the board that the limitation period began to run, not when  
26 workers received reduction in force cards, but rather, when the  
27 layoffs actually began to take effect. In this instant matter the  
28 Federation admits other mitigating circumstances, unrelated to  
29 union activity, may have prompted the College not to hire Mr.  
30 Talley for the Spring and Summer academic quarters of 1989 and the  
31 unfair labor charge should be interpreted to reflect actions taken  
32 during the Fall quarter of 1989 - within the statutory period.

1 Although Mr. Waltmire was informed of the cancelled classes on May  
2 2, 1989 the particular class was not scheduled to begin until June  
3 19, 1989, just one day inside the six months statutory period. The  
4 Federation's arguments supporting a timely filing of the unfair  
5 labor charges are somewhat weak and will be shown to be  
6 contradictory to arguments supporting merits of the charges.  
7 However, since the dates of "intent" do not trigger the statutory  
8 time period, I will rule the unfair labor practice charges were  
9 timely filed.

10 Notwithstanding the above discussion of the timeliness of the  
11 charges, the key elements in addressing the merits of this matter  
12 are the dates Mr. Talley and Mr. Waltmire were informed either they  
13 would not be re-hired or that certain classes would not be  
14 scheduled. Mr. Talley was informed on February 15, 1989, that he  
15 would not be re-hired and on May 2, 1989 Mr. Waltmire was informed  
16 certain classes would not be scheduled. Both events occurred  
17 clearly before the date the Petition for New Unit and Determination  
18 was filed with this Board (May 24, 1989) and, of course, before the  
19 date the College was served with the Petition (June 1, 1989).  
20 Although testimony was given that Mr. Waltmire and especially Mr.  
21 Talley were engaged in union activity prior to June 1, 1989, no  
22 evidence was presented to indicate any official of the College had  
23 any knowledge of Mr. Talley and Mr. Waltmire's organizing efforts  
24 prior to June 1, 1989. The initial decision not to re-hire Mr.  
25 Talley in February 1989 was based upon his formal assertion of a  
26 legal right to teach. Continuing refusal to re-hire Mr. Talley was  
27 in response to his on-going right to teach allegations and eventual  
28 suit filed in District Court. Cancellation and/or reassignment of  
29 classes that Mr. Waltmire had taught were based upon the previous  
30 decision to utilize full-time teachers whenever possible; the  
31 request of a full-time instructor for more teaching assignments;  
32 or, the lack of student enrollment warranting cancellation of the

1 class. I find no probative evidence which indicates the College  
2 retaliated against either Mr. Talley or Mr. Waltnire for their  
3 union activity. It should also be noted that Mr. Bob Zarotsky, a  
4 tenured full-time teacher who assisted in the union organizing  
5 efforts, made no claim or filed any charge alleging retaliation.

6 CONCLUSIONS OF LAW

7 1. The Board of Personnel Appeals has jurisdiction in this  
8 matter pursuant to Section 39-31-405 et seq., MCA.

9 2. The Defendant, Flathead Valley Community College, did not  
10 violate Section 39-31-401(1) MCA.

11 RECOMMENDED ORDER

12 1. It is ordered that Unfair Labor Practice Charge No. 67-89  
13 (Amended) be dismissed.

14 DATED this 15<sup>th</sup> day of February, 1991.

15 BOARD OF PERSONNEL APPEALS

16 By: Stan Gerke

17 STAN GERKE  
18 Hearing Examiner

19 SPECIAL NOTICE

20 In accordance with Board's Rule ARM 24.25.107(2), the above  
21 RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless  
22 written exceptions are filed within 20 days after service of these  
23 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER upon  
24 the Parties.

25 \* \* \* \* \*

26 CERTIFICATE OF MAILING

27 The undersigned hereby certifies that true and correct copies  
28 of the foregoing documents were, this day served upon the following  
29 parties or such parties' attorneys of record by depositing the same  
30 in the U.S. Mail, postage prepaid, and addressed as follows:

31 Dan Evans  
32 Field Representative  
American Federation of Teachers,  
APT, AFL-CIO  
P.O. Box 1246  
Helena, MT 59624

Jonathan B. Smith  
Chief Deputy County Attorney  
Flathead County  
P.O. Box 1516  
Kalispell, MT 59901-1516

33 DATED this 15<sup>th</sup> day of February, 1991.

Luc Thompson

SD279.6